

The U.S. Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures
in Developing Nations

by

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A Thesis submitted to
The Faculty of

The George Washington University
Law School
in partial satisfaction of the requirements
for the degree of Master of Laws

August 31, 2005

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Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 31 AUG 2005		2. REPORT TYPE N/A		3. DATES COVERED -	
4. TITLE AND SUBTITLE The U.S. Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) The George Washington University				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release, distribution unlimited					
13. SUPPLEMENTARY NOTES The original document contains color images.					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT UU	18. NUMBER OF PAGES 65	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

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I. Introduction

The benefits to a developing nation of structuring its procurement policies, rules, and institutions in a manner that ensures public funds are used efficiently are well understood.¹ When a government is consistently able to acquire the right item, at the right time, and at the right price, it can make more effective use of limited taxpayer funds – both to buy needed goods and services and to direct social and economic development. Nonetheless, outside of the successes of a few nations that are more aptly categorized as transitional rather than developing, the progress of procurement reform efforts in emerging and developing nations has been slow.²

Among the least successful initiatives in procurement reform has been the effort to establish mechanisms by which disappointed offerors³ can challenge the actions of

¹See generally Simon J. Evenett & Bernard M. Hoekman, *International Cooperation and the Reform of Public Procurement Policies*, Centre for Economic Policy Research (CEPR) Discussion Paper No. 4663 (October 2004); Simon J. Evenett, *Can Developing Countries Benefit from Negotiations on Transparency in Government Procurement in the Doha Round?*, United Nations Millennium Project, Task Force 9 (April 2003), available at <http://www.ycsg.yale.edu/documents/papers/Evenett.doc> (last visited May 11, 2005);

²See Robert R. Hunja, *Obstacles to Public Procurement Reform in Developing Countries*, in PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION 13, 16 (Sue Arrowsmith & Martin Trybus, eds., Kluwer Law International 2003), also presented at the WTO-World Bank Regional Workshop on Procurement Reforms and Transparency in Public Procurement for Anglophone African Countries, Dar Es Salaam, Tanzania, Jan. 14-17, 2003, and available at http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/hunja2a2_e.doc.

³In the words of Professor Steven Schooner:

The term ‘disappointed offeror’ is somewhat of a misnomer. Some protests, such as an allegation that the government’s solicitation is ambiguous or defective, are sufficiently proactive that the potential offeror has not yet become disappointed at the time the matter is commenced.

Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 639 n.36 (Feb 2001). Nonetheless, I will use the term throughout this paper to identify the putative plaintiff in bid protest actions.

public procurement officials that do not comply with established procurement rules.⁴

Despite robust public procurement development efforts by the World Bank, the World Trade Organization, and other international organizations, the incentives to gain membership in the Agreement on Government Procurement and other regional trade agreements that address government procurement,⁵ and the assistance offered by the United Nations Committee on International Trade Law (UNCITRAL)⁶ in the form of its Model Law on public procurement, few developing nations have produced effective bid protest systems.⁷

The reasons for the lack of success in this field are diverse. In some cases, national leaders, although reform-minded, do not have the political capital or will to take on the economic and bureaucratic powers that benefit from a public procurement status quo characterized by favoritism and/or corruption.⁸ Thus, they do not pursue efforts to establish bid protest systems that are sufficiently strong and independent to consistently reveal and disrupt existing corrupt practices. In other cases, there is simply a dearth of

⁴Interview with Jean-Jacques Verdeaux [hereinafter Verdeaux Interview], Senior Procurement Specialist, the World Bank, in Washington, D.C. (Apr. 27, 2005). For example, according to Mr. Verdeaux, there are only two or three effective bid protest systems in Africa.

⁵These agreements generally require member states to establish effective bid protest systems.

⁶UNCITRAL's mandate is to harmonize and unify the law of international trade. In pursuing its mandate, the Commission has created various model laws and legal guides. See <http://www.uncitral.org/uncitral/en/about/origin.html>.

⁷See generally Hunja, *supra* note 2. For the sake of clarity, I will use the term "bid protest system" throughout this paper to describe any national system established for the purpose of providing review procedures and/or legal remedies as an enforcement mechanism for those affected by a violation of established procurement rules. I will do so even in the context of discussing national and international systems which use different terms (such as "challenge procedures" or "review procedures") to describe their systems.

⁸See *id.* at 17-18.

people with the type of public procurement experience necessary to take on the task of establishing and running a centralized bid protest system.⁹ Or, in nations that are able to establish seemingly stable bid protest systems, there may be difficulties finding the balance of efficiency and fairness (grounded in independence and due process) necessary to encourage bidders to invest the time and money required to challenge government decision makers.

Despite the project's inherent difficulties, however, the quest to establish successful bid protest systems has proceeded apace. Why? Because, as Sue Arrowsmith notes, in order to have an effective procurement system "it is not sufficient that appropriate rules are in place: steps must be taken to ensure that they are applied."¹⁰ Bid protest systems fill this important enforcement role. In the process, they also provide systemic transparency by giving disappointed offerors, independent third parties, and attorneys an opportunity to examine procuring agency records and decisions. From this enforcement and transparency come the fruit of increased contractor participation in the procurement marketplace, more competition, and, ultimately, better products and services for the government buyer.

At a conceptual level, the fundamental considerations for designing effective bid protest systems are fairly well understood. Such systems are characterized by their speed and efficiency, the meaningfulness and independence of their review processes, and their

⁹*See generally id.*, at 18.

¹⁰SUE ARROWSMITH ET. AL., *REGULATING PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES* 749 (Kluwer Law International 2000).

ability to provide meaningful relief in appropriate cases.¹¹ When it comes to the task of actually devising and implementing systems that incorporate these elements, however, the path to success is less clear – as evidenced by the wide variation in the form and structure (and success) of the bid protest systems employed by the world’s developed nations. Simply put, a developing nation faces a plethora of difficult choices at the design and implementation stage: How will it ensure overall efficiency and, in particular, speedy remedies? Who will have standing to file protests? What process will be afforded disappointed offerors? Which remedies will be available? How will these remedies be enforced?

The most important of these choices, however, may well be that relating to forum structure – that is, who (procuring agency personnel, administrative board members, judges) will actually hear and decide bid protests? This structural element is significant for several reasons. First, the manner in which the review process is structured has great bearing on its overall speed and efficiency. For example, courts and administrative boards simply do not produce results as quickly as more informal, agency-level review bodies. Agency-level reviewers have direct access to the relevant data and decision-makers, and they are usually empowered to take immediate action to correct improper agency actions. Moreover, unlike courts and boards, the agencies themselves have an economic incentive to resolve protests quickly and at the least possible cost. Second, the various forum options offer differing degrees of independence (i.e., immunity from external influence) – or at least perceived independence. Third, the nature of a protest

¹¹See generally *id.*, at 761-803

forum or, more accurately, the makeup of its membership, can determine the extent to which its reviews are truly meaningful. For example, because courts and administrative boards often have diverse dockets, their members may be less likely to have the same public procurement expertise as procuring agency personnel who handle procurement matters on a daily basis.

The decisive question for a developing nation, then, which this paper examines, is which of the available structural options best integrates the essential elements of an effective bid protest system *in the context of* existing legal, political, cultural, and economic circumstances “on the ground.” The answer almost invariably given by the international organizations working on procurement reform (and that taken up by the international public procurement agreements) is that nations should focus their efforts on developing review bodies that are external to the procuring agencies themselves – because such bodies are more likely to be independent. However, while the “independence is paramount” perspective is intuitively inviting, it may not be practically expedient for a developing nation. For while independence is a key component of any effective review system, it does not necessarily follow that the relative benefit of increased independence offered by courts and boards outweighs the benefits of speed, efficiency, expertise, and non-adversarialism offered by agency-level review mechanisms. The discussion below proceeds in six parts. Part II considers the purposes and fundamental requirements of an effective bid protest system. Part III examines the challenges that developing nations face in attempting to establish protest mechanisms. Parts IV and V discuss the bid protest systems enforced by various international public

procurement agreements as well as those promoted by the World Bank and UNCITRAL. Part VI provides background on the agency-level bid protest procedures employed in the United States under FAR 31.103.¹² Part VII considers whether an agency-level review mechanism modeled after the U.S. system can suitably serve as a developing nation's primary forum for resolving bid protests and, at the same time, meet the demands of membership in the various international public procurement agreements. The paper concludes that although the U.S. agency-level system is flawed in some respects, it offers a superb solution for developing nations.

II. The Purposes and Essential Elements of an Effective Bid Protest System

In order to appreciate the challenges developing nations face in their efforts to establish effective bid protest systems, it is helpful to consider first why bid protest systems exist and what essential elements are required to make them work.

A. *Purpose of Bid Protest Systems*

Fundamentally, bid protest systems, like audit systems, serve a procurement oversight function.¹³ They provide a means of monitoring the activities of government procurement officials, enforcing their compliance with procurement laws and regulations, and correcting incidents of improper government action. A bid protest mechanism

¹²48 C.F.R. (Federal Acquisition Regulation (FAR)) § 33.103 [hereinafter "FAR"].

¹³See Robert C. Marshall et. al., *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 Hofstra L. Rev. 1 (1991); Schooner, *supra* note 3, at 682.

typically accomplishes the oversight function by means of third-party monitoring.¹⁴

Actual and prospective bidders are “deputized as private attorneys general”¹⁵ and given broad authority to challenge the actions of procurement officials before specially-designated agency officials or administrative or judicial bodies empowered to remedy violations of the procurement rules.¹⁶ Because protestors are motivated by direct economic interests in specific procurement actions, they generally provide more vigorous oversight than do auditors.¹⁷

Practically speaking, bid protest systems provide oversight by way of both deterrence and correction.¹⁸ The deterrent effect plays out when procurement officials are discouraged from circumventing the procurement rules by the threat of bid protests that could uncover their improper or illegal actions and impose potentially substantial

¹⁴William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 Admin. L. J. Am. U. 461, 486 (Fall 1995).

¹⁵Schooner, *supra* note 3, at 680.

¹⁶“The notion that private parties should be encouraged to litigate to advance public goals that coincide with their private interests has long been recognized in such areas as antitrust, securities law, and derivative actions.” Marshall et. al., *supra* note 13, at 4.

¹⁷*Id.* at 29-30.

Despite uncovering occasional sensational procurement blunders in the realm of federal procurements, audits, as currently implemented, do not systematically constrain the discretion of [procurement officials]. A major factor is the limited enforcement power available to auditors. [Procuring officials] cannot be deterred from abuse of discretion if sanctions are insubstantial and improbable . . .

Even if audits were supported by sanctions comparable to protests, audits have less deterrent power because auditors are not profit motivated and are likely to be at an informational disadvantage as compared to protestors because they come to a procurement as outsiders. The information advantage of protests mean that violations of procurement law are detected more effectively, and the profit incentive of the protestors assures more vigorous prosecution of violators.

sanctions on them and their agencies.¹⁹ Deterrence is necessary for a variety of reasons. First and foremost, procurement officials, regardless of how highly (or lowly) placed, are not immune to being influenced by outside incentives²⁰ to make decisions that are neither economically optimal nor consistent with the interests of their agencies or the public.²¹ The range of potential external incentives is considerable. The most notorious are those aimed directly at the financial self-interest of procuring officials – bribes and gratuities of various shapes and forms. The inevitable result of this sort of blatant corruption is, of course, that procurement officials improperly favor certain suppliers over others for reasons other than the merits of their products or services – to the detriment of the competitive process.²² Other incentives, however, are just as commonly encountered and

¹⁸*Id.* at 21.

¹⁹*See id.*; Kovacic, *supra* note 14, at 486-87; Schooner, *supra* note 3, at 682-86.

²⁰The recent well-publicized procurement fraud case involving Darlene Druyun, the Air Force's top procurement official, well illustrates the point. *See generally* Jeffrey Branstetter, *Darlene Druyun: An Evolving Case Study in Corruption, Power, and Procurement*, 34 Pub. Cont. L. J. 443 (Spring 2005).

²¹*See* Marshall, et. al., *supra* note 13, at 11 ("In the vernacular of economics, there is a 'principal-agent' problem. The government (the principal) wants a procurement official (its agent) to undertake a task on its behalf. The problem stems from the fact that the agent does not have the same objectives as the principal, and some aspects of the agent's behavior cannot be monitored.")

²²The results of corruption at the contract formation phase are seen in various ways:
The evaluation criteria in the request for proposals or tender documents could be drafted to favor a particular supplier or service provider or likewise could be drafted to emphasize the weaknesses of a particular competitor. Later during the evaluation of the proposals or tenders, the evaluation criteria could be misapplied or otherwise further defined or amended after proposal or tender receipt. During this phase, it is also possible that advance information could be provided to a particular favored supplier. Other techniques such as failing to solicit proposals or tenders from the competitors of a favored supplier, wrongfully restricting the tender pool, soliciting offerors known to be inferior to a favored supplier, simply mis-addressing tender documents, accepting late proposals or rejecting legitimate proposals are techniques that can be utilized to corrupt the procurement process.

result in similar anti-competitive favoritism. For example, a procurement official may be motivated to satisfy his superiors (i.e., high-ranking government officials) or his customers by selecting a particular product regardless of the specified evaluation and award criteria.²³

Second, procurement officials, like all public employees, are susceptible to the temptation to save time and effort by “cutting corners,” either because of slothfulness, insufficient incentives to maximize taxpayer interests (due to the lack of a profit motive or otherwise), a lack of resources,²⁴ or the perception that complying with cumbersome regulatory requirements will not add value to the procurement process.²⁵ In each case, the result is usually a less than optimal procurement.

The corrective function of the bid protest system plays out in a more obvious manner. Pursuant to the procedural rules of the selected protest review tribunal, a disappointed offeror may file a formal protest challenging the decision of a procurement official. When the reviewing body deems the bidder’s protest meritorious, it may recommend or enforce a remedy that includes corrective action – such as requiring the procuring agency to set aside or re-compete the procurement. So, too, the parties may engage in discussions, negotiations, or some other form of alternative dispute resolution (ADR) with the result that the procuring agency agrees to take corrective action in order

Jason P. Matechak, *Fighting Corruption in Public Procurement*, publication of the Center for International Private Enterprise, available at <http://www.cipe.org/pdf/publications/fs/matechak.pdf> (last visited July 11, 2005).

²³See Schooner, *supra* note 3, at 683 n.183.

²⁴See Marshall et. al., *supra* note 14, at 15-16.

²⁵See *id.*, at 14.

to avoid a formal, external bid protest. The corrective function applies more broadly than the deterrent function in the sense that bidders are able to protest inappropriate actions of procurement officials that are not generally “detractable” – such as inadvertent mistakes by procuring officials resulting from poor training, a lack of experience, or simple ineptitude.

In view of the central role bid protest systems play in enforcing appropriate decision-making by procurement officials at the contract formation stage, one can hardly overstate the importance of having an effective protest system.²⁶ No matter how thorough and modern a procurement system’s regulatory scheme may be, the system itself will break down if it has no effective mechanism for ensuring that the regulations are fairly applied and enforced.²⁷ The simple reality of this proposition is seen across the spectrum of human endeavor – where there is a dissonance between the written rules and what actually occurs in practice, people will be less interested in “playing the game” and there will be a concomitant decline in the level of competition. In the arena of public procurement, where the competitive process generates the incentives for contractors to maximize the value of their products and services to the government (in terms of price

²⁶See Schooner, *supra* note 3, at 682 n.171 (stating that enforcing compliance with procurement laws “implicates not just high standards of integrity, but also the maintenance of system transparency, the maximization of competition, and the furtherance of a host of . . . social policies”); Hunja, *supra* note 2, at 15 (“[E]xperience has shown that the most successful procurement systems are those that provide bidders a legal basis to challenge the actions of procurement officials when they breach the rules.”).

²⁷See Kenneth B. Weckstein & Michael K. Love, *Bid Protest System Under Review*, Legal Times, June 12, 1995, S29, (Special Report) (“If those affected by the breach of the rules cannot protest in a meaningful way, the rules have no teeth, and competition is stifled. Without the constraints of bid protests, government contracts will be let based on favoritism, undisclosed evaluation factors, and bribery . . .”).

and quality),²⁸ the decline in competition that inevitably results from lax enforcement of the procurement rules produces the systemic breakdown. The ultimate result is that the public pays considerably more for less.

B. *Elements of an Effective Bid Protest System*

The measure of a bid protest system's effectiveness as an oversight mechanism primarily turns on the degree to which the system engenders confidence in disappointed offerors that their efforts to challenge the actions of procuring officials will be worthwhile. In other words, if contractors are reasonably confident that their protests will receive due consideration and that their meritorious protests will actually result in meaningful corrective action, then they will be more likely to challenge inappropriate procurement official decisions. In turn, increased levels of successful protest litigation will, in theory, deter further inappropriate governmental acts.²⁹

Beyond the obvious requirement that a bid protest system provide standing for disappointed offerors to bring protests to a reviewing forum of some type, the elements or

²⁸See Schooner, *supra* note 3, at 710; see also Competition in Contracting Act ("CICA"), Pub. L. No. 98-369, Div. B, tit. VII, 99 Stat. 494, 1175 (codified as amended in various sections of 10 U.S.C., 31 U.S.C., 40 U.S.C., and 41 U.S.C.) (requires that executive agencies of the federal government attain "full and open competition" in the conduct of sealed bid or competitive proposal procurements except when specifically exempted from doing so). Most government procurement systems now operate on the principle of open competition. See generally Jean-Jacques Verdeaux, *Public Procurement in the European Union and in the United States: A Comparative Study*, 32 Pub. Cont. L.J. 713, 726-729 (Summer 2003) (discussing the role of open competition in public procurement by EU member states).

²⁹Of course, there are various potential negative ramifications of excessive bid protest litigation. This topic has been thoroughly discussed by various authors. See SUE ARROWSMITH, GOVERNMENT PROCUREMENT AND JUDICIAL REVIEW 305 (Kluwer Law International 1988); Marshall et. al., *supra* note 13, at 23-28; Kovacic, *Procurement Reform*, *supra* note 14, at 489-491.

considerations that are required to generate confidence in a system can be broken down into four categories:³⁰ (1) Speed/efficiency. By its nature, the public procurement process is a time-sensitive endeavor. Generally speaking, once the award process is completed, the contract will be awarded and performance will begin within a relatively short period of time.³¹ Thus, both the procurement system and the bid protest process within it must be arranged in a manner that permits disappointed offerors to quickly identify³² and respond to inappropriate decisions by procurement officials – because once a project begins, protest reviewers will be reluctant to impose the costs of delay on either the public or the winning bidder.³³ To put it somewhat differently, if a protest system is inordinately slow, then disappointed offerors will have little likelihood of ultimately gaining meaningful relief. Although a protest system can obviate this problem by granting reviewing bodies authority to suspend procurements while protests are pending,

³⁰These categories, and much of the content within them, are drawn from a talk given by Daniel Gordon, Managing Associate General Counsel, U.S. Government Accountability Office (GAO), at a special colloquium entitled “UNCITRAL and the Road to International Procurement Reform” held at The George Washington University Law School on Nov. 10, 2004. Mr. Gordon is also a Professorial Lecturer in Law at the George Washington University Law School. He made a similar (although much lengthier) presentation entitled “Review of Bid Protests in National Procurement Systems: The U.S. Federal Model” at the World Bank on the same day. His World Bank presentation is available in on-line video form at <http://info.worldbank.org/etools/bspan/PresentationView.asp?PID=1340&EID=661> (last visited July 11, 2005).

³¹ARROWSMITH ET. AL., *supra* note 10, at 761.

³²In competitive negotiated procurements, debriefings given by procuring agencies to unsuccessful bidders are generally the best method of providing such bidders with the information necessary to evaluate the fairness and integrity of the procurement process. For a very thorough review of the debriefing requirements and practices in the United States public procurement system, see Steven W. Feldman, *Legal and Practical Aspects of Debriefings: Adding Value to the Procurement Process*, Army Law. 17 (Oct. 2001).

³³See ARROWSMITH ET. AL., *supra* note 10, at 761.

lengthy suspensions impinge on the public interest and the rights of winning bidders.³⁴

Thus, the bottom line is that a bid protest system has to be capable of quickly producing both a decision and, if required, a remedy for the protestor.³⁵ The most obvious means of ensuring systemic speed is to impose time limits both on disappointed offerors for the bringing of protests and on reviewing bodies for publishing decisions.³⁶ Such time limits must, of course, take account of and balance a variety of factors, to include the extent that discovery will be available to unsuccessful bidders and any requirements relating to the exhaustion of remedies.

Almost as important as speed in the efficiency equation is the often overlooked matter of cost. A bid protest system that moves relatively quickly may yet prove useless if its procedures make the cost of participation too high relative to the potential benefits of filing a protest. A bid protest system that imposes some limitations on the extent to which disappointed offerors have to resort to full-blown litigation to gain relief will be more likely to keep protest costs to a reasonable level.

(2) Meaningful review. Although a bid protest system may give disappointed offerors an efficient means of filing protests, if the reviewing body receiving the protests does not or cannot consider them in a meaningful manner, then bidders will have little incentive to challenge procuring agency decisions. Ordinarily, a review will be meaningful if two elements are present: (a) the reviewing body is composed of persons who have some expertise in the field of public procurement, and (b) the reviewing

³⁴See generally *id.*, at 761-62.

³⁵See *id.*

officials are able to review and consider the relevant portion of the “record” of the procurement (i.e., the procuring agency’s files). Along these lines, the reviewing tribunal’s procedural rules relating to the extent to which disappointed offerors have access to the record and are able to present evidence or argument before a decision is rendered will impact the perceived meaningfulness of the review.³⁷ Further, the standard of review employed by the reviewing body provides a relevant indicator of its meaningfulness.³⁸

(3) Independent review. Independence in this context refers to the extent to which a protest reviewing body is secure from all types of external influence and is not biased in favor of either the procuring agency or the government.³⁹ Independence generally ensures both fairness and the appearance of fairness. The underlying expectation, of course, is that if those conducting a bid protest review have no personal or professional stake in its outcome then they will be more likely to provide the disappointed offeror meaningful relief when such relief is warranted. Although reviewers outside of the procuring agencies are more likely to be independent, procuring agencies can construct

³⁶*See id.*

³⁷*See generally id.*, at 764-69.

³⁸*See id.*, at 803-04 (“It can be argued that for review bodies wholly to abdicate responsibility over [factual and discretionary judgments] would leave too much latitude for procuring entities to abuse the rules, by disguising discriminatory decisions behind false factual and discretionary assessments.”).

³⁹The concern about bias in favor of the government exists, of course, because bid protest reviewing bodies (whether they be judicial, quasi-judicial, or administrative) are invariably “governmental” entities. The pressure to “toe the government line” can come from any number of sources. For example, a reviewing body member might feel beholden to the government official who appointed or hired him for the position.

internal review mechanisms that operate in a reasonably independent manner.⁴⁰

(4) Meaningful relief. A bid protest system must provide its protest reviewing officials or tribunals adequate authority to fashion and enforce both interim relief and final remedies that correct inappropriate procuring agency actions and make whole aggrieved disappointed offerors. As discussed above, because the procurement process is time-sensitive, procuring agencies are usually interested in staying on schedule during the contract evaluation and award stages, and both the agencies and their winning bidders generally wish to proceed with contract performance as soon as possible after award. However, if a contract is awarded and performance proceeds for any significant period during the pendency of a bid protest, then the disappointed offeror might well be deprived of any opportunity to obtain its sought-after relief – such as award of the contract.⁴¹ Thus, a protest review body must be vested with the power to suspend (or “stay”) the award of a contract or to stop work on a contract in appropriate circumstances pending resolution of a disappointed offeror’s protest in order to maintain the status quo and preserve the protestor’s commercial opportunities.⁴² Then, if the reviewing body sustains the protest, it must also have the power to compel the procuring agency either to set aside the specific improper decision or the procurement itself or to award some

⁴⁰In the U.S. system, the agency-level bid protest systems operated by the Army Material Command (AMC) and the United States Army Corps of Engineers offer independence insofar as protest reviews are conducted by a cadre of attorneys who are not involved in the procurement process itself.

⁴¹See ARROWSMITH ET. AL., *supra* note 10, at 773.

⁴²See *id.* These are commonly referred to as “interim measures” – that is, measures that “seek to ensure that a complainant’s position is not prejudiced by events occurring before the trial” or

measure of damages in the form of compensation to the complaining bidder.⁴³

At the same time, a bid protest system is also well served if both its procedural rules and the decisions of its protest reviewing bodies are published. Published decisions are particularly useful in lending transparency to the protest process (and the underlying procurement practices that are the subject of protests), which in turn educates contractors (and the public) and builds systemic trust.⁴⁴

III. Challenges in Creating Effective Bid Protest Systems

Regardless of the extent of a nation's political and economic development, the task of establishing an effective bid protest system can be very challenging. Even the most developed of nations have struggled (and still struggle) to balance the competing demands of independence, speed and efficiency, and due process. For example, the Canadian national bid protest reviewing authority, the Canadian International Trade Tribunal (CITT),⁴⁵ has been regularly criticized by both contractors and government

hearing. Sue Arrowsmith, *The Character and Role of National Challenge Procedures Under the Government Procurement Agreement*, 4 P. P. L. R. 235, 237 (2002).

⁴³See ARROWSMITH ET. AL., *supra* note 10, at 796.

⁴⁴See Evenett & Hoekman, *supra* note 1, at 28-29.

Not only will transparency have to be complemented by a variety of other actions and policies, to be effective any transparency norms need to be enforceable. Of particular importance here are domestic challenge procedures . . . In discretionary, non-transparent procurement systems losing firms have little incentive to protest against irregularities because of the power of procuring entities to black list them.

⁴⁵The CITT was established in 1993 in order to bring Canada in compliance with the NAFTA requirement that signatory nations have a national bid protest system. The CITT is an independent, quasi-judicial body that is not a part of any federal government department or agency. The Tribunal reports to the Canadian Parliament through the Minister of Finance. Decisions of the CITT may be appealed to the Federal Court of Canada, but only if they are found

officials for its inconsistent decisions and failure to see the “big picture” issues of public procurement in resolving individual cases.⁴⁶ Both sides believe the CITT’s bid protest decisions have actually resulted in “a risk-averse and more costly procurement system.”⁴⁷ A Parliamentary Secretary’s Task Force chartered for the purpose of reviewing the federal government’s procurement system and making recommendations for improvement recently recommended the Parliament thoroughly review the existing bid protest system.⁴⁸

In light of the difficulties experienced in Canada, it is not hard to imagine that the project of establishing an effective protest system in an emerging or developing nation is particularly fraught with pitfalls and challenges. As a basic proposition, the very notion of government oversight, let alone oversight by private citizens, is foreign to the legal traditions of many such nations. Thus, in some cases, the specialized project of establishing oversight mechanisms for government procurement systems cannot proceed very far absent progress in the greater effort to establish, among other things, traditions of respect for the rule of law and transparency in government decision-making.⁴⁹

to be “patently unreasonable.” See David M. Atwater, *Policy-Making by Choice at the Canadian International Trade Tribunal*, 16 Can. J. Admin. L. Prac. 263, 264-67 (Oct. 2003).

⁴⁶See generally *id.*, at 271-274.

⁴⁷MINISTRY OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, PARLIAMENTARY SECRETARY’S TASK FORCE: GOVERNMENT-WIDE REVIEW OF PROCUREMENT 31 (Hon. Walter Lastewka ed., January 2005), available at www.pwgsc.gc.ca/prtf/text/final_report-e.pdf (last visited July 11, 2005).

⁴⁸See *id.*, at 46.

⁴⁹On the general topic of transparency in government, see *Transparency International, the coalition against corruption*, at <http://www.transparency.org>. Although I give the issue of basic governmental reform only passing mention (as it is somewhat peripheral to my purpose in this paper), it is clearly a matter of substantial import when it comes to the entire project of

Nonetheless, many developing nations have recognized that a well-organized public procurement system can be a significant component of their overall national economic development efforts.⁵⁰ Hence, they have undertaken efforts to reform their procurement systems generally and, more specifically, to build effective bid protest mechanisms to provide enforcement and transparency. These efforts have met with varying degrees of success.⁵¹ In those nations that are transitioning from planned to market-based economies, the results have been somewhat encouraging.⁵² However,

establishing and maintaining effective public procurement systems. Simply put, when a nation has a weak tradition of respect for the rule of law and its government does not conduct its business in a transparent manner, it will have great difficulty operating an effective procurement system – let alone an effective bid protest mechanism. Cf. Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 P. P. L. R. 103, 104-106 (2002) (identifying transparency as one of the “pillars” of a successful procurement system). For example, in a nation with no tradition of transparency, government procurement officials may be quite resistant to the notion that they should disclose information from their procurement files to protesting unsuccessful bidders. For an excellent overview of the impact transparency has on a public procurement system, see Wayne Wittig, International Trade Centre, Presentation at the Joint WTO-World Bank Regional Conference on Procurement Reforms and Transparency in Public Procurement for Anglophone African Countries (14-17 Jan. 2003), available at http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/itcdemo2_e.pdf (last visited July 11, 2005). Wittig defines transparency, in the context of public procurement, as “the ability of all interested participants to know and understand the actual means and processes by which contracts are awarded and managed.”

⁵⁰See generally, Sue Arrowsmith, *National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?*, in PUBLIC PROCUREMENT: GLOBAL REVOLUTION 3 (Sue Arrowsmith & Arwel Davies, eds., Kluwer Law International 1998); Victor Mosoti, *The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?*, 25 U. Pa. J. Int’l Econ. L. 593, 599-602 (Summer 2004). The correlation between procurement reform and economic development has undergirded the substantial efforts of the World Bank and WTO to develop and reform public procurement systems worldwide. See

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,pagePK:84271~theSitePK:84266.00.html> (World Bank) and http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm (WTO).

⁵¹See Hunja, *supra* note 2, at 16.

⁵²See *id.* Primarily, these are the nations of Eastern and Central Europe. For an excellent overview of the procurement reform developments in Poland, the Czech Republic, Hungary,

reform efforts have been considerably less successful in the world's "middle income"⁵³ and truly "developing" nations.⁵⁴

Beyond the significant challenges presented by weakness in the rule of law and a lack of systemic transparency, emerging and developing nations commonly face several other impediments to establishing effective bid protest systems. First, in many cases, there are individuals and organizations in both the public and private sectors who have a vested interest in maintaining the public procurement status quo.⁵⁵ Whether they benefit

Slovakia, and Estonia, *see* Paul J. Carrier, *Analysis of Public Procurement Authorities in Central European Countries*, 3 P. P. L. R. 131 (2003). While the procurement reform efforts in Central and Eastern Europe have been a qualified success, they have certainly not come easily. The current reform efforts in Uzbekistan provide a good case study. Although leaders in the Uzbekistan central government have been supportive of procurement reform efforts, World Bank procurement officials recently identified numerous remaining obstacles to the establishment of sound public procurement practices, to include:

- (1) a weak legal and regulatory framework, punctuated by a proliferation of poorly coordinated legal texts and an absence of regulatory coverage of a range of issues relating to procurement methods and practices
- (2) a shortage of personnel trained in procurement matters
- (3) an underdeveloped private sector which fails to promote adequate competition for public contracts
- (4) government ownership of some components of the procurement system
- (5) a low level of awareness of the legislation applicable to public procurement.

See World Bank, Country Procurement Assessment Report (CPAR) – Uzbekistan (Feb. 2003), available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000094946_03052204062262 (last visited July 11, 2005).

⁵³*See* Hunja, *supra* note 2, at 14. Hunja includes countries such as Argentina, India, Indonesia, and Chile in this group, noting that:

[T]hese countries have had market based procurement systems in place but are in the process of modernizing such systems. The push toward modernizing . . . is motivated by a number of factors, most of which can be traced to the need to satisfy the demands of a more enlightened citizenry for more efficient and transparent systems of service delivery by government and for greater accountability in the management of public expenditures.

⁵⁴*See id.*; Verdeaux Interview, *supra* note 4.

⁵⁵Hunja, *supra* note 2, at 17.

from corruption in the existing legal and enforcement regimes or simply from the existence of entrenched practices of favoritism (such as the practice of denying market access to foreign firms), those who have an economic stake in the procurement process will almost inevitably oppose change.⁵⁶ Where such opposition is strong, national leaders may not have the political will to overcome it.⁵⁷ Moreover, even where leaders are able to reform national procurement laws and policies to inject greater systemic transparency and competition, they are not always immediately able to root out entrenched corrupt practices.⁵⁸ In this environment, resistance to the establishment of enforcement mechanisms, such as viable bid protest systems, can be particularly vigorous.⁵⁹ The challenge for nations facing such circumstances is found both in creating the framework for a bid protest system and in establishing within that system a set of rules that will actually result in efficient, meaningful, and independent reviews of protests and the provision (and enforcement) of meaningful relief when such protests are sustained.

A second challenge for developing nations is that they very often lack a sufficiently large contingent of well-trained procurement specialists capable of handling the broad spectrum of tasks associated with a fully functioning public procurement

⁵⁶*See id.*

⁵⁷*Id.*

⁵⁸The general issue of corruption in government and its impact on public procurement is amply addressed in the legal and economic literature. *See, e.g.,* John Linarelli, *Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspectives*, in PUBLIC PROCUREMENT: GLOBAL REVOLUTION 125 (Sue Arrowsmith & Arwel Davies, eds., Kluwer Law International 1998).

⁵⁹*See* Hunja, *supra* note 2, at 20 (noting that some governments will go to considerable lengths to “create a semblance of formal compliance with procedural and other requirements while seriously compromising the intent and spirit of such rules”).

system.⁶⁰ For example, while a nation may have a number of procurement personnel working within its various agencies to monitor the bidding, evaluation, and contract award functions, it may not have the “extra” personnel needed to handle post-award contract administration matters or to serve in oversight roles – such as on bid protest review bodies. Compounding the problem is the fact that, in many developing nations, procurement officials do not have “professional” standing but are rather classified as “clerical” workers. Thus, they are not well paid.⁶¹ One result of this arrangement is that government procurement personnel, once trained and experienced, often leave the government to take more lucrative positions in the private sector.⁶²

Along similar lines, and more specific to the issue of establishing bid protest mechanisms, the existing judicial and administrative systems in many emerging and developing nations are simply not well suited to the business of resolving bid protests. In the first instance, the sitting judges and administrators in such nations may not have had significant exposure to public procurement concepts and legal requirements and the

⁶⁰“A good framework of policies, procedures and documents is essential, but the quality of procurement depends on the people who implement the system, their competence, training, intelligence, objectivity, motivation, and ethics.” World Bank, CPAR – India [hereinafter India] (Dec. 10, 2003), page 16, available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000012009_20040402111746 (last visited July 11, 2005);

⁶¹See OECD/DAC – World Bank Roundtable on Strengthening Procurement Capacities in Developing Countries (22-23 Jan. 2003), *Making Procurement a Profession*, available at [http://webdomino1.oecd.org/COMNET/DCD/ProcurementCWS.nsf/viewHtml/index/\\$FILE/1_makingprocurementprofession.pdf](http://webdomino1.oecd.org/COMNET/DCD/ProcurementCWS.nsf/viewHtml/index/$FILE/1_makingprocurementprofession.pdf) (last visited July 11, 2005).

⁶²*Id.*; Interview with Gulnara Suyerbayeva, Senior Lawyer at “Business-Inform” corporation of Almaty, Kazakhstan (participant in U.S. Department of State academic exchange program), in Washington D.C. (Mar. 15, 2005) [hereinafter Suyerbayeva Interview].

economic and market principles that underlie them.⁶³ Thus, they may be predisposed to question the validity of protests which, as a general rule, allege that the government has failed to comply with requirements intended to foster open-market competition. Second, the judicial systems in many developing nations are prone to inefficiency – that is, they are costly, slow, and, in some instances, corrupt.⁶⁴ As discussed *infra*, where a reviewing body cannot consistently resolve bid protest cases in a relatively prompt manner (i.e., before contract performance is very far along), unsuccessful bidders will see little use in expending the resources required to bring protests to the forum.

Finally, it is often the case that developing nations lack a coherent, over-arching system of procurement laws and a national-level office dedicated to policy-making and the oversight of public procurement.⁶⁵ The common, debilitating results, as Robert Hunja

⁶³This problem is not necessarily unique to developing nations. Even in the most developed countries, judges and other officials who review procurement protests oftentimes have little experience in the field. Nevertheless, in developing nations, the degree of unfamiliarity with concepts like transparency and competition and other market principles is likely to be more acute.

⁶⁴Suyerbayeva Interview, *supra* note 62. Again, these problems are not the sole province of emerging and developing nations. However, they do appear as a common thread in the Country Procurement Assessment Reports (CPARs) produced by the World Bank. See, e.g., World Bank, CPAR – Malawi (May 24, 2004), page 29, available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000160016_20040609124611 (last visited July 11, 2005) (“the court system is perceived as costly [and] cumbersome . . . it is a common perception that the lower Magistrate Courts are riddled with corruption”); World Bank, CPAR – Republic of Azerbaijan (June 2003), page 24, available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000112742_20030930122244 (last visited July 11, 2005) (“[T]here appears to be some way to go before the general public . . . will have sufficient confidence in the court system to make it a suitable forum for the resolution of procurement disputes.”). It is also worth noting that, in many emerging and developing nations, the mere thought of filing a lawsuit or protest against the government, justified or not, is still beyond the imagination of many private businesses (for more than just good public relations reasons).

⁶⁵Hunja, *supra* note 2, at 15; see India, *supra* note 60, at pages 20-21; World Bank, CPAR – Chile (August 2004), page 17, available at <http://www->

puts it, are “diverse interpretations and implementation of existing [procurement] rules across various public agencies” and gaps in enforcement.⁶⁶ Under these conditions, a bid protest system may have little practical utility to disappointed offerors due to its lack of predictability.⁶⁷

IV. Bid Protest Procedures in the Major International Public Procurement Agreements

Bid protest procedures are now well-established as a key feature of every major national procurement regime as well as the international trade agreements that address government procurement – such as the Agreement on Government Procurement, the North American Free Trade Agreement, and the European Union Procurement Directives.⁶⁸ The rationale for the inclusion of these enforcement provisions, as discussed above, is straightforward:

[A]n effective means to review acts and decisions of the procuring entity and the procurement procedures followed by the procuring entity is essential to ensure the proper functioning of the procurement system and to promote confidence in that system.⁶⁹

While the international agreements are largely the domain of the world’s developed nations, the attractions of membership, to include the promise of both increased

wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000012009_20041119095309 (last visited July 11, 2005).

⁶⁶Hunja, *supra* note 2, at 15.

⁶⁷*Id.*, at 15, 21.

⁶⁸ARROWSMITH ET. AL., *supra* note 10, at 750

⁶⁹UNCITRAL Model Law, Chap. VII, para 1, found in Annex I to the reports of UNCITRAL in the Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A48/17) and Forty-ninth Session, Supplement No. 17 (A/49/17).

international market access for domestic products and services and the liberalization of the domestic markets themselves,⁷⁰ encourage developing nations to craft protest systems consistent with those called for by the agreements.⁷¹ As such, the agreements have provided a backdrop, or template, for some of the current development in national bid protest systems.

Having said that, because the primary purpose of these agreements is to promote international trade by prohibiting discriminatory treatment, the agreements do not necessarily offer a complete “blueprint for achieving domestic [procurement reform] objectives.”⁷² In other words, the agreements do not provide the sort of comprehensive rules and procedures that may be useful to nations that are just beginning to reform their public procurement systems.⁷³ Nonetheless, the agreements are very relevant when it comes to the project of identifying the key characteristics of a model bid protest system for developing nations, because the developing nations themselves will at some point be interested in gaining accession to the agreements – and in order to do so, they will be required to have “compliant” bid protest systems.

⁷⁰See Sue Arrowsmith, *Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha*, 5 *Journal of International Economic Law* 761, 769 (December 2002); but see Simon J. Evenett & Bernard M. Hoekman, *Transparency in Government Procurement: What Can We Expect From International Trade Agreements?*, in *PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION* 269 (Sue Arrowsmith & Martin Trybus, eds. 2003) (arguing that the efficacy of using international trade agreements as an instrument to improve the transparency of procurement regimes may be overstated).

⁷¹Robert J. Hunja, *The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform* in *Public Procurement: Global Revolution* 106 (Sue Arrowsmith & Arwel Davies, eds., Kluwer Law International 1998)

⁷²Sue Arrowsmith, *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard*, 53 *Int'l & Compl. L. Q.* 17, 19 (2004).

A. Agreement on Government Procurement

The Agreement on Government Procurement,⁷⁴ or GPA, is a plurilateral agreement⁷⁵ of the World Trade Organization (WTO) designed to subject the procurement of goods and services by government agencies to international competition by bringing it under the purview of internationally agreed trade rules. The GPA primarily meets this objective by requiring member states to eliminate the discriminatory procurement procedures and practices nations have historically used to favor domestic industries and to deny foreign products and services access to their markets.⁷⁶

In its earliest form, the GPA did not require its signatories to establish mechanisms by which private parties could directly challenge or protest alleged breaches of the Agreement.⁷⁷ Instead, disappointed offerors were required to seek redress through

⁷³*See id.*

⁷⁴Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter “GPA”], Annex 4(b), *available at* http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf (last visited July 11, 2005).

⁷⁵The GPA is “plurilateral” because not all WTO members are bound by it. The current parties to the agreement are Canada, the European Communities (including its 25 member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxemburg, Malta, the Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, and the United States. Seven countries are currently negotiating accession to the Agreement. They include Albania, Bulgaria, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, and Taiwan. In addition to these nations, eleven other nations hold “observer” status: Argentina, Australia, Cameroon, Chile, China, Colombia, Croatia, Mongolia, Republic of Armenia, Sri Lanka, and Turkey.

⁷⁶*Overview of the Agreement on Government Procurement*, available at http://www.wto.org/english/tratop_e/gproc_e/over_e.htm (last visited July 11, 2005).

⁷⁷The first Agreement on Government Procurement was concluded during the Tokyo Round of GATT negotiations and was signed in 1979. It entered into force in 1981. The standard practice in most WTO agreements is not to provide private parties the right to enforce WTO rules. *See*

the WTO's broad-based inter-governmental dispute settlement system.⁷⁸ This enforcement system quickly proved to have limited use in remedying specific breaches, primarily because it did not permit sufficiently rapid action on protests.⁷⁹ Accordingly, the original parties to the GPA added a requirement that member states make national bid protest procedures available to disappointed offerors.⁸⁰ The requirement was added to the GPA in 1994 as Article XX and became effective on January 1, 1996.

Article XX of the GPA gives modest treatment to each of the fundamental requirements of an effective bid protest system,⁸¹ although with some potentially

SUE ARROWSMITH, *GOVERNMENT PROCUREMENT IN THE WTO* 385 (Kluwer Law International 2003).

⁷⁸*Id.*; see also Mary Footer, *Remedies Under the New GATT Agreement on Government Procurement*, 2 P.P.L.R. 80, 81 (1995).

⁷⁹The proverbial "straw that broke the camel's back" was a WTO Dispute Settlement panel's decision in the so-called "Trondheim case." In that case, the panel found that a Norwegian entity's failure to use competitive selection procedures to award a contract violated the Tokyo Round procurement agreement. However, the panel refused to require that Norway annul or re-bid the contract, stating that it did not consider such a remedy within its purview and, further, that the remedy would be too injurious to both the public and the successful bidder. See generally ARROWSMITH, *supra* note 77, at 38.

⁸⁰*Id.* at 39-40. In the GPA, these procedures are referred to as "challenge procedures," but I will refer to them as bid protest procedures for the sake of consistency with other parts of this paper.

⁸¹See *infra* Part II.B. Although Article XX's purpose is to require member states to establish procedures for suppliers to challenge alleged breaches of *the GPA itself* rather than breaches of domestic procurement rules, the implicit assumption is that a member state's domestic procurement rules will include a similar mechanism for challenging procuring officials' decisions. As Sue Arrowsmith puts it:

[I]t is unlikely that a State will deliberately confer on other GPA firms rights in the tendering process that are more extensive than those enjoyed by domestic firms . . . the GPA's requirements will normally be incorporated into general national tendering rules and the whole system made enforceable in the same way by both domestic firms and benefitting third country firms.

ARROWSMITH, *supra* note 77, at 392.

troublesome gaps in the details.⁸² As an initial matter, the GPA provides that member states should “encourage” disappointed offerors to first seek resolution of complaints by bringing those complaints directly to the procuring agencies themselves.⁸³ When such “consultations” take place, procuring agencies are to give bidder complaints “impartial and timely consideration.”⁸⁴ Beyond this, however, member states that use agency-level review mechanisms are not required to afford disappointed offerors any particular measure of due process to ensure fair and just outcomes; nor are they required to compel procuring agencies to negotiate evenhandedly with protestors in order to settle disputes.⁸⁵ Thus, while the requirement for impartiality suggests that agencies are supposed to use procedures that ensure some measure of independence in this review,⁸⁶ GPA member states are not legally obligated to see to it that their procuring agencies do anything more than superficially review bidder complaints.

Instead, the GPA favors external review bodies that are judicial in nature.

⁸²The existence of these “gaps” (or perhaps more appropriately, ambiguities) is principally attributable to the fact that the GPA’s initial signatories wished to “recognize the diversity of national legal traditions.” They did so by writing Article XX in a manner that allows member states broad discretion in determining how to construct their bid protest forums and review procedures. *Id.* at 394.

⁸³GPA, *supra* note 74, article XX, para. 1 (“In the event of a complaint by a supplier . . . each party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity.”)

⁸⁴*Id.*

⁸⁵As discussed below, the GPA explicitly relies on the prospect of third-party enforcement as the disciplinary “stick” to encourage candid and straightforward agency behavior at the complaint resolution stage. *See* ARROWSMITH, *supra* note 77, at 387-88.

⁸⁶Such as might be achieved by giving complaints to an official or officials who did not participate in the original procurement decision. *See id.*

Specifically, the GPA's Article XX requires that member states permit "suppliers"⁸⁷ to bring their complaints before either a court or an "impartial and independent review body."⁸⁸ A member state may employ a reviewing tribunal that does not have the status of a court only if the tribunal's decisions are subject to judicial review or if its rules provide participants with certain minimum due process protections. For example, the forum's rules must permit disappointed offerors to be heard, to be represented, to present witnesses, and to attend all proceedings.⁸⁹ In addition, the "impartial and independent reviewing body" must have the power to access pertinent documents relating to the procurement, must open all of its proceedings to the public, and must reduce its decisions to writing.⁹⁰

The GPA's approach here, while undoubtedly conducive to the establishment of review bodies that are independent, holds two potential shortcomings. First, the GPA does not demand that those who serve on the external, "non-judicial" reviewing bodies have government procurement expertise.⁹¹ Second, the GPA does not specify the extent

⁸⁷The GPA does not define the term "suppliers."

⁸⁸GPA, *supra* note 74, article XX, para. 6 (a review body must have "no interest in the outcome of the procurement" and its members must be "secure from external influence"). The Agreement does not, however, account for other safeguards that may be necessary to ensure the independence of the reviewing body's members. For example, as Sue Arrowsmith points out, "it is not clear what safeguards must exist against [the] dismissal or other termination of the term of office [of members of the body], or the extent to which pay and other conditions must be guaranteed." ARROWSMITH, *supra* note 77, at 394.

⁸⁹GPA, *supra* note 74, article XX, para. 6.

⁹⁰*Id.*

⁹¹The shortcoming is also aptly considered in the context of judicial reviewing bodies if such bodies are "specialized" in the sense that they are arranged for the primary or predominant purpose of hearing government contract bid protest cases. Where the reviewing court is not

to which such reviewing bodies may compel government agencies to fully disclose the contents of their procurement files, or the extent to which suppliers may gain access to such documents.⁹² Thus, although the rules guarantee suppliers an independent and procedurally fair review, they do not necessarily guarantee that the review will be meaningful. If, for example, a supplier does not have access to certain core documents from a procuring agency's files,⁹³ then the supplier will not be able to show that procuring officials made an inappropriate or unlawful decision, and any review provided could be superfluous. So, too, if the members of the reviewing body have limited government procurement expertise, they may fail to identify or appreciate the nuances of improper government actions.

On the matter of ensuring systemic speed and efficiency, the GPA recommends that member states impose timeliness requirements both on disappointed offerors and on the reviewing bodies themselves. First, member states may require disappointed offerors to file protests “within specified time-limits from the time when the basis for the complaint is known or reasonably should be known.”⁹⁴ Second, member states must ensure that the bid protest process as a whole is “completed in a timely fashion.”⁹⁵ The

specialized, it can be expected that its judges will have varying degrees of familiarity with government procurement matters.

⁹²A supplier does have the right to request that a procuring agency provide it an explanation of the reasons why its bid was rejected and what characteristics and advantages of the winning bid favored its selection. GPA, *supra* note 74, article XVIII, para. 2. However, this debriefing process does not include the disclosure of procurement documents.

⁹³The core documents from a procurement might, for example, include bid evaluation documents.

⁹⁴GPA, *supra* note 74, article XVIII, para. 5. The time limit cannot be less than 10 days.

⁹⁵*Id.* at para. 8.

problem with this second provision is manifest – it is too vague to be enforceable.⁹⁶

Thus, it gives no real assurance that a national system will be inherently capable of resolving protests quickly enough to protect the rights of suppliers to obtain meaningful remedies.

With respect to remedies, Article XX requires that member states grant their bid protest tribunals authority to provide disappointed offerors three types of relief: interim measures, the correction of improper procuring agency decisions, and compensation for losses or damages.⁹⁷ In the case of interim measures, the GPA specifically identifies suspension of the procurement process pending resolution of a supplier’s protest as one remedial option that must be available to reviewing bodies.⁹⁸ The GPA does not, however, impose a requirement for mandatory suspensions. In order to prevent excessive costs to third parties and the public in cases where interim measures are imposed, the GPA permits member states to provide a mechanism by which procuring agencies may override suspensions or other interim measures.⁹⁹

Article XX does not indicate how far members states must go in giving their reviewing bodies authority to grant corrective and compensatory relief – except that it provides that member states may restrict compensatory awards to the “costs for tender

⁹⁶*See generally* ARROWSMITH, *supra* note 77, at 397.

⁹⁷GPA, *supra* note 74, article XX, para. 7.

⁹⁸*Id.*

⁹⁹*Id.* A procuring agency must provide the reviewing body with a written justification of the “overriding adverse consequences” upon which it based its override decision.

preparation or protest” only.¹⁰⁰ As such, the GPA’s remedial provisions, like other of its provisions, may be too imprecise to prevent practices that might negate the overall effectiveness of a nation’s bid protest system. Notably, a GPA member state could arguably restrict its system’s available remedies to such an extent that disappointed offerors would have little incentive to pursue protest actions.¹⁰¹

B. *North American Free Trade Agreement (NAFTA)*¹⁰²

NAFTA, like many of the regional international trade agreements, includes a chapter on government procurement. Because of its limited geographic scope, NAFTA is not itself an agreement that will attract the interest of developing nations that hope to enjoy the benefits of international trade. However, it offers a model for the type of bid protest systems required under regional trade agreements, which developing nations may be inclined to emulate.

The NAFTA bid protest framework, like that set out in the GPA, generally addresses each of the essentials of an effective protest system – with a similar lack of precision in certain particulars. On the matter of speed and efficiency in resolving protests, NAFTA makes three general pronouncements. First, it provides that member

¹⁰⁰*Id.* Thus, a system need not permit disappointed offeror’s to receive compensation for lost profits or other damages. See ARROWSMITH, *supra* note 77, at 401

¹⁰¹*See id.*

¹⁰²The North American Free Trade Agreement between the Government of the United States, the Government of Canada, and the Government of Mexico, Dec. 17, 1992, 32 I.L.M. 296 [hereinafter NAFTA], available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (last visited July 11, 2005). While the analysis here focuses on NAFTA, the United States has entered into other, bilateral trade agreements,

states may limit the amount of time disappointed offerors have to initiate bid protests.¹⁰³

Second, the bid protest reviewing bodies established by member states must “expeditiously” investigate bid protests.¹⁰⁴ Third, the reviewing bodies must provide their findings and recommendations “in a timely manner.”¹⁰⁵ As is the case with the GPA’s treatment of overall protest processing efficiency, what constitutes “timeliness” at the decisional stage is subject to broad interpretation. As such, NAFTA leaves the door open for member states to establish and operate bid protest systems that do not move quickly enough to provide truly meaningful relief to disappointed offerors.

NAFTA addresses the principles of independent and meaningful review somewhat less formally than does the GPA. Instead of requiring member states to afford disappointed offerors access to either courts or tribunals that employ procedures commonly associated with courts, NAFTA simply requires that member states establish reviewing bodies that have “no substantial interest in the outcome of procurements.”¹⁰⁶ The Agreement provides no further details regarding either the structure of reviewing bodies or the extent to which they must afford disappointed offerors due process. In this respect, NAFTA is similar to the GPA. While it plausibly ensures that suppliers will

which also carry requirements regarding bid protest mechanisms. *See* http://www.ustr.gov/Trade_Agreements/Section_Index.html.

¹⁰³NAFTA, *supra* note 102, Chapter 10, Article 1017, para. 1(f). The time limit may not be less than 10 working days from the time the basis for the protest becomes known or reasonably should become known to the supplier.

¹⁰⁴*Id.* at para 1(h). The Agreement provides no definition for “expeditiously,” which creates some danger that a NAFTA-compliant bid protest system could be ineffective in the sense that it reviewing bodies might move too slowly to hold open the possibility of meaningful relief for suppliers bringing meritorious protests.

¹⁰⁵*Id.* at para 1(n).

have their protests heard by reviewing bodies that are independent, it is not at all clear that the reviews themselves will be sufficiently meaningful to engender supplier confidence.

As for the “placement” of member states’ reviewing bodies, NAFTA does not specifically require that they be external to the procuring agencies themselves. However, NAFTA implies a preference for external arrangements by providing that member states may encourage disappointed offerors to seek review of their complaints “*with the entity concerned* prior to initiating a bid challenge” (emphasis added).¹⁰⁷ In other words, it appears that member states may create informal mechanisms by which disappointed offerors may bring their protests to the procuring agencies themselves for resolution, but such mechanisms need not be considered part of the formal national bid protest system. The Agreement offers no guidance regarding these agency-level review mechanisms.

NAFTA identifies two methods by which disappointed offerors may obtain relief. First, protest reviewing bodies may apply interim measures to suspend or otherwise delay procurements pending resolution of protests.¹⁰⁸ Suspensions are by no means mandatory. Moreover, even where a suspension might otherwise appear appropriate, reviewing bodies may take account of urgent circumstances (e.g., where delay would be “contrary

¹⁰⁶*Id.* at para 1(g).

¹⁰⁷*Id.* at para 1(b).

¹⁰⁸*Id.* at para. 1(j) (“in investigating the challenge, the reviewing authority may delay the awarding of the proposed contract pending resolution of the challenge”).

to the public interest”) to refrain from effecting a suspension.¹⁰⁹ Unlike the GPA, NAFTA does not prescribe the method by which reviewing tribunals are to take notice of such circumstances. Second, reviewing bodies may sustain protests and then “recommend” that the relevant procuring agency provide specified relief to the protestor.¹¹⁰

On this point, NAFTA differs drastically from the GPA. Whereas the GPA requires that reviewing bodies have the authority to issue binding decisions against procuring agencies,¹¹¹ NAFTA allows its signatories to use reviewing bodies that are merely admonitory in nature. Although NAFTA further provides that “entities normally shall follow the recommendations of the reviewing authority,”¹¹² the obvious implication of the provision as a whole is that member states may operate systems in which the procuring agencies are free to decide whether or not to follow reviewing tribunal recommendations. One ramification of this formulation, of course, is that if procuring agencies make it a practice to ignore reviewing body recommendations, then disappointed offerors will have little incentive to file protests (and, concomitantly, less incentive to participate in the public procurement marketplace) – and the protest system

¹⁰⁹*See id.* It is not clear whether a reviewing body may *sua sponte* determine that circumstances surrounding a procurement are sufficiently urgent to warrant foregoing interim measures or whether it is the obligation of the procuring agency to raise such concerns.

¹¹⁰*See* NAFTA, *supra* note 102, Chapter 10, Article 1017, para. 1(k).

¹¹¹*See* GPA, *supra* note 74, Article XX, para. 7 (“challenge procedures *shall* provide for . . . correction of the breach of the Agreement or compensation . . .”).

¹¹²NAFTA, *supra* note 102, Chapter 10, Article 1017, para 1(l).

may cease to function as an effective deterrent to improper agency actions.¹¹³

Finally, NAFTA takes the interesting step of opening the door for protest reviewing bodies to take up a policy-making role. Member states are apparently obliged to grant their reviewing authorities power to “make additional recommendations in writing to an entity respecting any facet of the entity’s procurement process that is identified as problematic during the investigation of [a] challenge.”¹¹⁴ This provision clearly envisions protest reviewing bodies with considerable public procurement expertise – answering one of the GPA’s potential shortcomings.

C. *European Union*

For the transitional nations of Eastern and Central Europe, membership in the European Union (EU) (or the prospect thereof) has been a primary driving force behind public procurement reform, including reforms aimed at establishing effective bid protest systems.¹¹⁵ Thus, the EU Procurement Directive’s “remedies” provisions¹¹⁶ have supplied the framework for a number of nascent bid protest systems.¹¹⁷

¹¹³With that said, this type of system has been successful in the United States. The recommendations of the GAO are followed by the procuring agencies in 98 percent of all cases. See Jason Miller, *OPM Rejects GAO Advice on Portal Contract*, Government Computer News, Vol. 22, No. 20 (July 25, 2005), at http://appserv.gcn.com/22_20/news/22919-1.html.

¹¹⁴NAFTA, *supra* note 102, Chapter 10, Article 1017, para 1(m).

¹¹⁵See Carrier, *supra* note 52, at 131-32 (“An important part of accession negotiations with the candidate countries . . . is the harmonization of public procurement laws and practices including the development of an effective and rapid national review procedure.”)

¹¹⁶Council Directive 89/665/EEC, 1989 O.J. L395/33 [hereinafter 1989 Directive] (relating to the award of public supply and public works contracts); Council Directive 92/13/EEC, 1992 O.J. L076/14 [hereinafter 1992 Directive] (relating to the award of public service contracts).

¹¹⁷The EU bid protest procedures are substantially similar to those found in the GPA, as Article XX of the GPA was modeled after the EU Directives. Carrier, *supra* note 52, at 89.

An immediately noteworthy feature of the EU Directives is their emphasis on speed – that is, on establishing protest mechanisms that are capable of quickly resolving protests.¹¹⁸ In fact, the first paragraph of each Directive calls for member states to put in place procedures that ensure contracting agency decisions “may be reviewed effectively and, in particular, as rapidly as possible”¹¹⁹ Nevertheless, despite their rhetorical emphasis on efficiency, the Directives suffer from the same potentially debilitating malady that afflicts both the GPA and NAFTA: While the Directives’ general intentions regarding timeliness are clear, their lack of specificity on the matter leaves room for member states to utilize protest systems that do not, in fact, move quickly enough to provide either meaningful relief for disappointed offerors or an effective deterrent for procuring agencies. For example, the Directives do not require member states to impose time constraints on either potential protestors (relating to how promptly they must bring complaints) or reviewing bodies (relating to how promptly they must render decisions).¹²⁰ The timeliness problem is especially acute in those EU nations that rely on their oftentimes slow-moving administrative courts as the primary forum for the consideration

¹¹⁸In the preamble to Council Directive 89/665/EEC alone, there are multiple references to the fact that, because of the time-sensitive nature of public procurement actions, EU member states must establish national bid protest mechanisms that can “urgently” and “rapidly” deal with alleged infringements of the procurement rules at “a stage when [they] can be corrected.” This emphasis is largely attributable to the EU’s previous experience with review procedures that were both cumbersome and ineffective. *See* Footer, *supra* note 78, at 88.

¹¹⁹1989 Directive, *supra* note 116, Article 1, para 1.

¹²⁰The reason for the lack of time constraints is apparently grounded in the notion, common to the GPA, that nations must be given freedom to fit their bid protest mechanisms within their existing judicial or administrative systems. While this is undoubtedly a commendable goal, it can ultimately undermine the entire project of establishing effective bid protest systems. As the EU Directives well establish by their introductory language, speed is paramount in the world of bid

of bid protests. In those nations, it is not uncommon for disappointed offerors to receive decisions on complaints well after the opportunity for meaningful relief has passed.¹²¹

The EU Directives take much the same approach as the GPA when it comes to ensuring the independence of reviewing bodies. First, the Directives explicitly encourage the use of reviewing bodies that are judicial in character.¹²² If a member state uses a reviewing body that is not a court, the body must reduce its decisions to writing and those decisions must then be subject to review by either a court or another body that is “independent of both the contracting authority and the [initial] review body.”¹²³ The Directives take the additional step of requiring that such independent “appellate” bodies be composed of members who are appointed to and leave office under conditions similar

protests. And, yet, speed, or at least consistent speed, is the first thing sacrificed when strict procedural rules are foregone.

¹²¹See generally SIGMA-OECD Paper No. 30, *Public Procurement Review Procedures*, 18 Dec. 2000, available at http://www.sigmaweb.org/pdf/SIGMA_SP30_00E.pdf (last visited July 11, 2005). The problems caused by slow-moving courts are exacerbated because, in many EU member states, public contracts are binding on the parties upon signing and cannot be challenged even if specific acts prior to the signing violated the governing procurement rules. *Id.* at page 11; see also ARROWSMITH ET. AL., *supra* note 10, at 786. On a similar note, it is worth considering that a number of EU member states have given public procurement entities at the central government level independent authority to challenge improper actions by procuring agencies. In fact, the Commission of the European Community (Commission) has taken the view that all member states should appoint a national authority that would be responsible for the “surveillance of contracting entities’ compliance with procurement law.” See Internal Market Strategy: Priorities 2003 – 2006, COM(2003)238 final at 17, available at http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0238en01.pdf (last visited July 11, 2005). This may indicate that the Commission is dissatisfied with the extent to which disappointed offerors have been willing to take on the enforcement function – which might be attributable to suppliers’ lack of confidence in their respective systems’ ability to provide timely remedies. Notably, the Commission has expressed concern that “litigation at [the] national level can be slow and expensive and is therefore not always a viable option.” *Id.* at 28.

¹²²1989 Directive, *supra* note 116, at art. 2, para. 8; 1992 Directive, *supra* note 116, at art. 2, para. 9.

¹²³1989 Directive, *supra* note 116, at art. 2, para. 8; 1992 Directive, *supra* note 116, at art. 2, para. 9.

to those applied to judges and that they utilize pre-decisional procedures that, at a minimum, permit both sides to the dispute to be heard.¹²⁴ As with both the GPA and NAFTA, the Directives fail to speak to the qualifications of those who would serve on established protest-reviewing bodies.

Regarding remedies, the Directives require that each member state's review procedures provide for interim relief, including "measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision by the contracting authority."¹²⁵ The Directives do not require that member states automatically suspend procurement actions upon a disappointed offeror's initiation of bid protest proceedings.¹²⁶ Further, the Directives authorize member states to permit their reviewing bodies to consider the economic and public policy consequences interim measures might have when deciding whether to impose them.¹²⁷

In addition to requiring that reviewing bodies have the authority to impose interim measures, the Directives also require that reviewing bodies have the power to correct or set aside improper procurement decisions and to award compensatory damages as appropriate.¹²⁸ The Directives identify the particular potential corrective action of setting

¹²⁴1989 Directive, *supra* note 116, at art. 2, para. 8; 1992 Directive, *supra* note 116, at art. 2, para. 9.

¹²⁵1989 Directive, *supra* note 116, at art. 2, para. 1; 1992 Directive, *supra* note 116, at art. 2, para. 1.

¹²⁶1989 Directive, *supra* note 116, at art. 2, para. 3; 1992 Directive, *supra* note 116, at art. 2, para. 3.

¹²⁷1989 Directive, *supra* note 116, at art. 2, para. 4; 1992 Directive, *supra* note 116, at art. 2, para. 4.

¹²⁸1989 Directive, *supra* note 116, at art. 2, para. 1; 1992 Directive, *supra* note 116, at art. 2, para. 1.

aside “discriminatory technical, economic or financial specifications in the invitation to [bid], the contract documents or in any other document relating to the contract award procedure.”¹²⁹ In cases where a contract that is the subject of a protest has already taken effect, the Directives permit member states to limit the available remedy to compensatory damages only.¹³⁰ Unfortunately, this limitation can have the effect of encouraging procuring agencies to rush into contracts to avoid challenges.¹³¹ The consequence of such behavior, of course, is that a protest system can be rendered ineffective. This is particularly true when disappointed offerors are not otherwise able to obtain interim relief in meritorious cases.¹³²

V. Bid Protest Procedures in the UNCITRAL Model Procurement Law and World Bank Development Program

The international public procurement agreements have undoubtedly played an influential role in procurement reform efforts in developing nations. However, their

¹²⁹1989 Directive, *supra* note 116, at art. 2, para. 1(b); 1992 Directive, *supra* note 116, at art. 2, para. 1(b).

¹³⁰1989 Directive, *supra* note 116, at art. 2, para. 6; 1992 Directive, *supra* note 116, at art. 2, para. 6.

¹³¹*See* ARROWSMITH ET. AL., *supra* note 10, at 787. This is not a theoretical issue. The European Commission has brought more than one EU member state before the European Court of Justice to challenge national laws the Commission believed improperly permitted procuring agencies to simultaneously award and sign public contracts – thereby denying unsuccessful bidders the possibility of challenging the validity of the award decision and taking legal action at a stage when the matter could still be rectified. The Commission most recently took such action against Spain. *See* Press Release, European Commission, *Public Procurement: Commission Acts to Enforce EU Law in Germany, Greece, Spain, Italy, Austria, Portugal, and Finland* (January 14, 2005), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/44&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited July 11, 2005).

¹³²*See* ARROWSMITH ET. AL., *supra* note 10, at 787.

influence falls well short of that attributable to the UNCITRAL Model Law on Procurement of Goods, Construction, and Services¹³³ and the World Bank's development programs. Notably, most of the nations of central and eastern Europe and the former Soviet Union as well as some nations in Africa and elsewhere have, at least in some measure, built their procurement systems around the Model Law.¹³⁴ For its part, the World Bank has fostered reforms in a host of nations by requiring they adopt competitive and transparent procurement procedures in order to qualify for development funds dedicated to public infrastructure projects. In many cases, the World Bank has encouraged nations to use the UNCITRAL Model Law as a framework for reform.¹³⁵ For these reasons, the bid protest procedures set out in the Model Law and promoted by the World Bank carry great currency in the world's developing nations.

A. *UNCITRAL Model Procurement Law*

Unlike most of the rest of its provisions, the Model Law's section on bid protest systems is fairly basic in the sense that it provides a broad outline for structuring protest systems rather than a comprehensive set of procedures and rules for running them. The

¹³³The text of the Model Law, along with a Guide to Enactment, are found in Annex I to the reports of UNCITRAL in the Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17) and Forty-ninth Session, Supplement No. 17 (A/49/17) [hereinafter UNCITRAL Model Law and, separately, Guide to Enactment]. Both the legal text and Guide to Enactment are also available (as one complete document) at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html (last visited July 11, 2005). According to its preamble, the model law is primarily designed to help nations reform and/or develop their national public procurement laws (grounded in the principles of competition, fair treatment, integrity, and transparency) and to promote open international markets.

¹³⁴See Arrowsmith, *supra* note 72, at 20; see also Hunja, *supra* note 71 at 105-108.

¹³⁵Arrowsmith, *supra* note 72, at 21.

drafters took this approach in order that the section might be “accommodated within the widely differing conceptual and structural frameworks of legal systems throughout the world.”¹³⁶ Although laudable for its deference to existing national legal systems, the approach arguably leaves too much room for maneuvering.¹³⁷ For example, the Model Law gives limited treatment to such matters as efficiency, independence, and the provision of meaningful relief, particularly as these matters relate to reviews conducted outside of the procuring agencies themselves. As a result, this spare approach means in, in practice, that nations using the Model Law’s review procedures may not establish truly effective bid protest systems.

As for the structure it does provide, the Model Law immediately takes a much stronger stance on the usefulness of agency-level reviews than do the international trade agreements. The UNCITRAL Model Law incorporates an agency-level review mechanism as a mandatory component of its bid protest system: except in cases where the underlying procurement contract has already taken effect, disappointed offerors are required initially to submit their complaints in writing to the procuring agency for review and consideration.¹³⁸ The UNCITRAL Model Law’s approach thus requires review, in the first instance, in the procuring agencies.

The Model Law’s approach is grounded in the notion that agency-level reviews provide an efficient means of winnowing out, short of the litigation stage, those protests

¹³⁶Guide to Enactment, *supra* note 133, Chap. VI, para 6.

¹³⁷*See generally* Arrowsmith, *supra* note 72, at 41-42.

that can be easily resolved by the parties – such as cases involving obvious procuring agency mistakes or oversights.¹³⁹ In order to preserve this efficiency, the Model Law imposes time limits on the agency-level review process. First, a disappointed offeror must submit its protest to the procuring agency within 20 days of when it became aware of or should have become aware of the circumstances giving rise to the protest.¹⁴⁰ Second, if the protest is not resolved by mutual agreement of the parties, the head of the procuring agency must issue a written decision on the protest within 30 days after its submission by the disappointed offeror.¹⁴¹

The Model Law also takes the unique step of requiring procuring agencies to *automatically* suspend procurements for a period of seven days upon a disappointed offeror's timely submission of a non-frivolous protest to the agency.¹⁴² The goal, again, is to promote efficiency. In addition to preserving the possibility of meaningful relief for disappointed offerors, automatic suspensions (or the threat thereof) create an incentive for procuring agencies to quickly resolve bidder complaints – even before they are formally presented for review.¹⁴³ The Model Law does, however, recognize that suspension may

¹³⁸UNCITRAL Model Law, *supra* note 133, Art. 53 (1). This is what is often termed an “exhaustion” requirement. That is, a disappointed offeror must exhaust its right to review at the procuring agency level before proceeding to other protest review fora.

¹³⁹*See* Guide to Enactment, *supra* note 133, Art. 53, para 1.

¹⁴⁰UNCITRAL Model Law, *supra* note 133, Art. 53(2).

¹⁴¹*Id.* at Art. 53(4). If the procuring agency fails to issue a written decision within the prescribed time, the disappointed offeror may institute protest proceedings at another reviewing forum. *Id.* at Art. 53(5).

¹⁴²*Id.* at Art. 56(1). The head of the procuring agency may extend the suspension, pending disposition of the review proceedings, so long as the total suspension period does not exceed 30 days. *Id.* at Art. 56(3).

¹⁴³*See* Guide to Enactment, *supra* note 133, at Art. 56, para. 1.

be inappropriate in some cases. To this end, it grants procuring agencies the right to “override” suspensions where urgent or compelling circumstances favor such action.¹⁴⁴

The Model Law is silent on the procedural aspects of its agency-level review mechanism. For example, it does not address whether disappointed offerors should be granted a hearing or should be able to “discover” the procuring agency’s files. It does, however, recognize the desirability of independence in the review process by calling for the heads of procuring agencies, rather than contracting officers or other lower level procurement personnel, to determine whether protests have merit. Although this arrangement provides no guarantee of independence, agency heads are arguably more likely to see the systemic benefits of taking a fair look at bidder complaints than are those who are directly involved in the individual procurements themselves. Further, on the matter of remedies, as the Guide to Enactment explains, procuring agencies are empowered to correct irregularities in procurement practices by whatever means they deem appropriate.¹⁴⁵

The Model Law requires that disappointed offerors have recourse to a review

¹⁴⁴See UNCITRAL Model Law, *supra* note 133, at Art. 56(4).

¹⁴⁵See Guide to Enactment, *supra* note 133, at Art. 54, para. 8.

The approach of [article 54], which specifies the remedies that the hierarchical administrative body may grant, contrasts with the more flexible approach taken with respect to the corrective measures that the head of the procuring entity or of the approving authority may require (article 53(4)(b)). The policy underlying the approach in article 53(4)(b) is that the head of the procuring entity or of the approving authority should be able to take whatever steps are necessary in order to correct an irregularity committed by the procuring entity itself or approved by the approving authority.

forum outside of the procuring agency itself if the underlying contract has already taken effect or if the head of the procuring agency fails to issue a timely decision or issues an unfavorable decision.¹⁴⁶ Nations may use already existing administrative or judicial review fora to accomplish this review, or they may create new fora.¹⁴⁷ For nations with legal systems that ordinarily provide hierarchical administrative reviews of agency decisions, the Model Law's Guide to Enactment emphasizes that review bodies employed to consider bid protest "appeals" should be "independent of the procuring entity."¹⁴⁸ However, the Guide to Enactment does not offer further guidance on the concept of independence, in terms of how administrative board members might be protected from the influence of government interests generally.

In fact, the Model Law largely leaves nations to their own devices when it comes to running administrative and judicial bid protest review processes, for it imposes only three specific requirements for administrative reviews and none for judicial reviews. The requirements for administrative review are as follows: First, administrative tribunals considering bid protests must be empowered to suspend the procurement process for at least seven days and up to thirty days after a disappointed offeror files a timely and non-frivolous protest.¹⁴⁹ Second, they must be competent to grant or recommend remedial relief for disappointed offerors. The Model Law specifically lists, among other things, the remedies of (a) prohibiting procuring agencies from acting on unlawful decisions, and

¹⁴⁶See UNCITRAL Model Law, *supra* note 133, at Art. 54(1).

¹⁴⁷See Guide to Enactment, *supra* note 133, at Art. 54, para 3.

¹⁴⁸*Id.*

¹⁴⁹See UNCITRAL Model Law, *supra* note 133, at Art. 56(1)-(3).

(b) annulling unlawful procuring agency acts and decisions.¹⁵⁰ The Guide to Enactment suggests, regarding the remedy-granting requirement, that “a State may include all of the remedies listed . . . or only those remedies than an administrative body would normally be competent to grant in the legal system of that State.”¹⁵¹ Third, administrative review bodies must issue written decisions on protests within 30 days.¹⁵²

Beyond these requirements, the Model Law leaves administrative bodies to consider bid protests using whatever procedures they normally employ in cases involving private party appeals from government agency decisions. The obvious weakness to this non-directive approach is that nations may continue using systems that deprive disappointed offerors of important due process protections.

Finally, on the matter of judicial review, the Model Law simply provides that nations may use their existing judicial systems to consider bid protests (whether directly or on appeal from some administrative body) and offers no specific recommendations on the conduct of such reviews.

B. *World Bank Procurement Reform Efforts*

As discussed above, the World Bank often encourages nations to utilize the UNCITRAL Model Law in constructing or updating their procurement systems. That said, the World Bank takes a somewhat different tack than the Model Law on the matter of developing bid protest systems. In practice, the Bank is less willing to rely primarily

¹⁵⁰*See id.*, at Art. 54(3).

¹⁵¹Guide to Enactment, *supra* note 132, at Art. 54, para. 8.

¹⁵²*See* UNCITRAL Model Law, *supra* note 132, at Art. 54(4).

on agency-level review mechanisms.¹⁵³ The Bank strongly encourages its borrowing nations to use bid protest reviewing bodies that are external to procuring agencies, because of concerns that agency personnel at procuring agencies may be tied to their agencies' agendas – and thus not disposed to make independent judgments.¹⁵⁴

VI. Agency-Level Bid Protests in the U.S. Public Procurement System

As the discussion above reflects, many systems, at least to some extent, permit disappointed offerors to bring protests to the procuring agencies for review and resolution.¹⁵⁵ What is uncommon, however, is to find an agency-level system that possesses both a well-developed procedural framework and, more importantly, the confidence of the government contractor community.¹⁵⁶ The agency-level system used in the United States appears to come close to satisfying these criteria.¹⁵⁷

In the United States, disappointed offerors have long engaged in the practice of bringing bid protests to the procuring agencies.¹⁵⁸ However, until the mid-1990s, the practice had no formal statutory or regulatory foundation. Procuring agencies considered

¹⁵³Verdeaux Interview, *supra* note 4.

¹⁵⁴*Id.*

¹⁵⁵*See* ARROWSMITH ET. AL., *supra* note 10, at 763-64.

¹⁵⁶As discussed throughout, the common source of this lack of confidence is contractor skepticism about the ability of procuring agencies to consider protests in an independent and unbiased fashion.

¹⁵⁷Contractors have sufficient trust in the system that they annually bring hundreds of protests to the various federal agencies. *See* Erik Troff, *Agency Level Bid Protest Reform: Time for a Little Less Efficiency?*, *The Clause*, Vol. XVI, Issue 2, at 20 (Summer 2005), at http://www.bcabar.org/the_clause.htm. This compares favorably with the sparse use that agency-level review mechanisms see in some countries. Suyerbayeva Interview, *supra* note 61.

¹⁵⁸*See e.g.*, JOHN CIBINIC, JR. AND RALPH C. NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* 1484 (3d ed. 1998).

protests on an ad hoc basis, usually at the level of the contracting officer.¹⁵⁹ In 1995, then-President Clinton issued an Executive Order requiring all federal government agencies to establish agency-level bid protest systems.¹⁶⁰ The impetus behind the Executive Order was the administration's "reinventing government" initiative,¹⁶¹ which sought to make all government operations, including public procurement activities, more efficient. The idea was that an agency-level forum would provide a more efficient means of resolving bid protests because of its emphasis on informal protest resolution rather than the adversarial and litigation-style methods utilized in the other protest fora.¹⁶² The concern at the time was that bid protests had become too confrontational and expensive and that, as a result, procuring agencies were reducing their interactions with bidders in order to avoid giving them grounds upon which to lodge protests – to the detriment of the public procurement system as a whole.¹⁶³

Pursuant to the requirements of the Executive Order, the relevant regulatory bodies drafted a comprehensive policy, now found in Federal Acquisition Regulation

¹⁵⁹*Id.*

¹⁶⁰Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995).

¹⁶¹*See generally* the National Performance Review Report, Reinventing Federal Procurement (Sept. 14, 1993), at PROC06, *available at* <http://govinfo.library.unt.edu/npr/library/nprpt/annrpt/sysrpt93/reinven.html> (last visited July 11, 2005).

¹⁶²Regarding protest forum option in the United States, in addition to bringing their protests to the several agencies, disappointed bidders may also bringing protests to the Government Accountability Office (GAO), whose jurisdictional statute is 31 U.S.C. § 3551 et. seq., and the U.S. Court of Federal Claims (COFC), whose jurisdictional statute is 28 U.S.C. § 1491(b). *See* Jonathon R. Cantor, Note, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*, 27 Pub. Con. L.J. (Fall 1997), for a thorough discussion of the forums and their roles in the U.S. bid protest system. There is no exhaustion requirement in the U.S. system – in other words, bidders may initially bring their protests to any one of the available fora.

(FAR) 33.103, to guide procuring agencies in the development of their agency-level bid protest programs.¹⁶⁴ Informed by the efficiency and economy mandates of the Executive Order, FAR 33.103 emphasizes open communication and informality as a means of avoiding the delays and expenses associated with litigation. The emphasis on communication is seen, among other places, in the regulation's first substantive paragraph, which encourages agencies to pursue "open and frank discussions" with aggrieved suppliers even before they have filed formal protests.¹⁶⁵ The system's preference for an informal approach to dispute resolution is clearly seen in its recommendation that agencies consider using alternative dispute resolution techniques to settle protests.¹⁶⁶

In addition to the aforementioned general inducements to speed and efficiency, FAR 33.103 incorporates several specific provisions to achieve this end. First, the rule clearly identifies the filing requirements for disappointed offerors.¹⁶⁷ Second, the rule

¹⁶³See Reinventing Federal Procurement, *supra* note 161.

¹⁶⁴The Civilian Agency Acquisition Council and the Defense Acquisitions Regulations Council issued the final rule on January 2, 1997. See 62 Fed. Reg. 270 (1997).

¹⁶⁵See FAR 33.103(b).

¹⁶⁶FAR 33.103(c) ("The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.").

¹⁶⁷See FAR 33.103(d)(2).

Protests shall include the following information: (i) Name, address, and fax and telephone numbers of the protestor. (ii) Solicitation or contract number. (iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protestor. (iv) Copies of relevant documents. (v) Request for a ruling by the agency. (vi) Statement as to the form of relief requested. (vii) All information establishing that the protestor is an interested party for the purpose of filing a protest. (viii) All information

does *not* incorporate formal discovery procedures and does not use standard litigation procedures – there are no pleadings, briefs, or motions. As a result, disappointed offerors can, and sometimes do, bring protests without the assistance of legal counsel. Third, FAR 33.103(e) requires that contractors file their protests in a timely manner. Protests based on apparent solicitation improprieties must be filed before bid opening or the closing date for the receipt of proposals.¹⁶⁸ In all other cases, contractors must file protests no later than 10 days after the basis for the protest is known or should have been known.¹⁶⁹ Finally, the regulation sets a 35-day goal for resolving protests.¹⁷⁰

FAR 33.103 also addresses the other fundamental requirements of an effective bid protest system. First, on the matter of ensuring independence in the reviewing process, the regulation requires agencies to provide disappointed offerors an opportunity to present their protests to an agency official who is senior to the contracting officer in the agency hierarchy.¹⁷¹ The notion is that there will be less likelihood of institutional bias in the review process if the review function is kept out of the hands of the person who was directly involved in making the original allegedly improper decision. To this end, each agency is obligated to pre-identify the official or officials who will conduct bid protest

establishing the timeliness of the protest.

¹⁶⁸FAR 33.103(e).

¹⁶⁹*Id.*

¹⁷⁰FAR 33.103(g). The provision states that agencies should “make their best efforts” to resolve protests within 35 calendar days after the protest is filed. Because few agencies maintain statistics regarding their agency-level bid protest programs, there is no way to determine if this goal is regularly attained. At least one agency, the Army Material Command (AMC), has shown a consistent ability to complete protest reviews in well under 35 days. However, AMC’s achievement is probably the exception rather than the rule. *See* Troff, *supra* note 157 at 32.

reviews and, “when practicable,” to ensure that these officials have not had previous personal involvement in the procurement.¹⁷² The obvious shortcoming of this arrangement is that agencies may still put protest decision-making authority in the hands of agency officials who are not very far removed from the protested procurement decisions and who thus may have difficulty conducting objectively fair reviews.

Second, regarding remedies, the regulation contemplates that agencies will grant relief via interim measures,¹⁷³ the correction of improper procurement decisions,¹⁷⁴ and the payment of protest costs to prevailing parties.¹⁷⁵ On the matter of interim measures, the FAR’s agency-level procedures grant disappointed offerors substantially greater rights than would be required under any of the international public procurement agreements reviewed above. Notably, when a bidder files a timely protest, the procuring agency is required to put the procurement on hold until the protest is resolved.¹⁷⁶ This mandate applies to both pre- and post-award protests. In other words, not only must a

¹⁷¹See FAR 33.103(d)(4) (“interested parties may request an independent review of their protest at a level above the contracting officer”).

¹⁷²*Id.*

¹⁷³See FAR 33.103(f).

¹⁷⁴See FAR 33.102(b)(1). Agencies are empowered to take any action or grant any remedy that could be recommended by the Comptroller General if the protest were to be filed with the GAO. For example, they may terminate a contract, re-compete a contract, or issue a new solicitation. For a full listing of the remedies available to the Comptroller General in GAO bid protest cases, see 4 C.F.R. § 21.8 (2003).

¹⁷⁵See FAR 33.102(b)(2).

¹⁷⁶See FAR 33.103(f). In order to gain entitlement to a “stop work order” (that is, agency action to stop work on an already existing contract), a disappointed bidder must file his protest within 10 days after contract award or within 5 days after his debriefing. FAR 33.103(f)(3). This rule differs from the general timeliness rule of FAR 33.103(e) for the filing of protests.

procuring agency refrain from awarding a contract while a protest is pending, it must also stop performance if the contract has already taken effect in the hands of another bidder.

In cases in which the procuring agency believes proceeding with contract award or performance is justified by “urgent and compelling reasons” or the “best interests of the government,” the agency may override the stop work requirement – so long as the override action is approved at “a level above the contracting officer.”¹⁷⁷ The news is not all positive for disappointed offerors when it comes to interim measures, however. If a contractor initially protests to the agency, it may well lose out on its right to have the procurement suspended when it “appeals” an unfavorable agency decision to the Government Accountability Office (GAO),¹⁷⁸ as the GAO imposes strict filing timeliness requirements on bidders who hope to benefit from its authority to suspend procurements.

Finally, on the matter of ensuring that agency-level reviews are actually conducted in a meaningful manner, FAR 33.103 takes something of a “middle-ground” approach. On the one hand, by the very nature of its arrangement, it assures disappointed offerors that their protests will be reviewed by persons who have considerable public procurement expertise and who have complete access to the record pertaining to the particular protested procurement. On the other hand, as already discussed, because of the forum’s efficiency-based emphasis, it does not require either that disappointed offerors be

¹⁷⁷FAR 33.103(f)(1), (3). Override actions are not common in practice. *See Troff, supra* note 157, at 26.

¹⁷⁸A protestor who is not satisfied with a procuring agency’s resolution of its complaint may renew its case at either the GAO or COFC. In either case, the agency’s decision will have no bearing on the new proceeding – thus, a protestor’s resort to either fora does not truly constitute an “appeal.”

given access to the procurement record themselves or that they be given opportunity to formally present evidence or argument to the decision authority. Accordingly, the extent to which reviews are meaningful largely depends on how far individual agencies go in instituting internal practices that enforce fairness in the review process.

VII. Viability of the U.S. Agency-Level Bid Protest System as a Model for Developing Nations

There is little question that a well-organized agency-level bid protest system can provide benefits not always seen in the “external” administrative and judicial bid protest fora: speedy and inexpensive results, reviews conducted by highly experienced procurement personnel, and an informal and non-adversarial review format. Nonetheless, at least in the United States, agency-level systems have been relegated to a position of low esteem in the eyes of many in the public procurement community because of one intrinsic shortcoming: their relative lack of independence – or the perception thereof. Agency reviewing officials, no matter how highly placed, are subject to untold potential influences to shade their decisions in favor of their agencies, and agency-level systems usually do not have a mechanism for managing or countering this built-in potential for bias. Thus, regardless of whether an agency reviewing official gives in to these influences, his decisions are bound to be viewed with some degree of suspicion.

So, where does this legitimate concern about independence leave agency-level bid protest systems in general, and the U.S. system in particular, in terms of their viability as models for developing nations? Out in the cold? Not necessarily, for the benefits of efficiency, experienced reviewers, and non-adversarialism which are clearly borne out in

the U.S. system may well be more valuable to developing nations than the marginal benefits of independence.

A. *Effectiveness of the U.S. Agency-Level Bid Protest System*

Taking a step back, when it comes to judging whether a particular proposed “model” public procurement practice or system can be successfully transferred from one nation to another, among the first considerations must be whether the practice or system actually works in its “home” country. This question is certainly legitimate here, as the U.S. agency-level bid protest system is not without its defects or detractors. Although some federal government agencies in the U.S. have developed exceptionally efficient bid protest programs, the forum has seen declining use in recent years and has never garnered overwhelming contractor support.¹⁷⁹ In fact, a number of attorneys who practice in the field of public procurement have been critical of the overall usefulness of the agency-level system as currently constructed.¹⁸⁰ By and large, these criticisms derive from concerns about systemic shortcomings relating to independence and transparency.¹⁸¹ Regarding independence, contractors and attorneys have voiced doubts about the general

¹⁷⁹See generally Troff, *supra* note 157; see also Ralph C. Nash, Jr. & John Cibinic, Jr., *Dateline January 2005*, 19 N &CR ¶ 5 (“it is our impression that many agencies have not adopted effective procedures to carry out [the] mandate [to create agency-level bid protest systems]”).

¹⁸⁰See Troff, *supra* note 157, at 21.

¹⁸¹*Id.* Although disappointed offerors make use of the system in fairly large numbers, it appears that they are willing to do so only in those cases where the alleged procuring agency errors are easily discernable from the face of the solicitation or bid documents or relate to clearly defined procedural requirements.

ability of procuring agency personnel to render fair and impartial protest decisions.¹⁸²

Regarding transparency, they have identified the system's lack of an enforceable discovery mechanism as an impediment to the openness and information sharing necessary to guarantee that reviews are both fair and meaningful.

In response to these concerns and others, the U.S. Congress has considered (but not yet approved) several proposals to reform the agency-level forum.¹⁸³ The reform efforts have focused primarily on bolstering the forum's independence – that is, its capacity to produce unbiased outcomes – rather than on improving its transparency. For example, one proffered reform would require agencies to vest decision-making authority regarding both protests themselves and any procurement suspension/"stay" override requests at the highest possible levels within the agencies.¹⁸⁴ Another proposal would require agencies to continue automatic procurement suspensions/"stays" during the pendency of both the initial agency-level protest and any follow-on "appeals" to the GAO.¹⁸⁵

¹⁸²*Id.* The practice of lower-level personnel handling protest reviews is permitted in the U.S. system in the sense that the rules permit agencies to vest review authority as low as one level above the contracting officer.

¹⁸³The most recent reform effort is included in the pending bill known as the Acquisition System Improvement Act, H.R. 2067, 109th Congress, 1st Sess. (2005) [hereinafter ASIA]. The full text of the bill is available at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.2067.IH>. The bill has not yet been the subject of Congressional hearings.

¹⁸⁴*See* ASIA, *supra* note 183, §§ 103(a), (b). FAR 33.103(d)(4) and (f) currently give agencies fairly broad discretion in identifying who will handle these tasks. *See supra* notes 171 and 177 and accompanying text.

¹⁸⁵*Id.* at § 103(c). The proposal would enforce "stay" carry-overs in cases where protestors file follow-on protests with the GAO within 5 days after issuance of the agency decision. Although this reform would not address independence head on, it would likely encourage agencies to build a measure of independence (and the fairness that usually follows) into their systems in order to avoid "appeals" to the GAO and the prospect of lengthy "stays."

Although they have not been broached in any of the procurement reform bills, reforms aimed at improving the agency-level forum's transparency are also probably warranted. As things stand, most government agencies have implemented the rules of FAR 33.103 in a manner that favors decisional speed and efficiency over openness and due process. For example, agencies rarely open their procurement files to agency-level protestors because, in their view, doing so would undermine the system's efficiency. This arrangement, although permitted by the rules, ultimately causes contractors to question whether agencies are giving their protests fair and impartial consideration. With such concerns, contractors are more comfortable bringing their more important or complex protests, such as those challenging the bid evaluation process and other subjective agency decisions, to the other protest fora. As such, the agency-level system would likely benefit from the enforced transparency of discovery (in some limited form) and the publishing of protest decisions.¹⁸⁶

Despite these deficiencies, the U.S. agency-level bid protest system still capably processes a great number of protests, and some agency programs have shown flashes of the system's considerable potential. Most notably, at least one agency has demonstrated a consistent ability to resolve protests in a matter of weeks (rather than the months

¹⁸⁶*See generally*, Troff, *supra* note 157. The transparency producing effects of the discovery process can also beget greater independence in the review process. If disappointed offerors have access to the same information as the agency-level protest decision-makers, they are better positioned to cry foul when the decision-makers render decisions biased in favor of their agencies. Such "negative publicity" may then serve to encourage unbiased, independent thinking. The potential beneficial effect is amplified, of course, if disappointed offerors have recourse to appeal agency-level decisions to other protest fora.

required by the other protest fora) and at a very low cost.¹⁸⁷ So, too, various agencies have made significant strides in reducing the level of adversarialism in the protest process (through the use alternative dispute resolution techniques) and in taking advantage of the “repeat player” nature of the public procurement marketplace. In this regard, the agency-level forum has provided procuring agencies and their regular suppliers a means of resolving problems without driving the potentially destructive wedge of litigation into their mutually-beneficial relationships.

B. *Basis for Transferability to Developing Nations*

The bottom line regarding the U.S. agency-level system is that, despite doubts about its current effectiveness, its undeniable strengths – efficiency, professionalism, and non-adversarialism – warrant the attention of any nation interested in constructing a successful national bid protest system. They are all coveted systemic characteristics, for obvious reasons. For a developing nation, however, the solutions offered by the U.S. system may well be of considerably greater value because of their practical utility in an arena of potentially debilitating constraints.

This reality plays out in several ways. First, both the procuring agencies and their suppliers in developing nations may be operating from a base of very limited resources because of existing national fiscal and economic circumstances. As such, they are in no position to absorb the direct and indirect costs inflicted by slow-moving, litigation-based bid protest systems – costs which other nations might take more or less for granted. In

¹⁸⁷See *supra* note 170.

this setting, efficiency in resolving disputes and protests is paramount. To take it a step further, where there is no efficient protest reviewing option, procuring agencies and their suppliers may be incentivized to engage in practices that undermine the effective working of the procurement system as a whole. In other words, if existing courts and boards are taking many months to resolve protests, agencies and suppliers will look elsewhere for relief. For the procuring agencies this may mean finding ways to limit their communications with bidders in order to restrict their vulnerability to protests and the accompanying delays.¹⁸⁸ For suppliers, it may mean choosing to forego the protest process altogether even in meritorious cases in order to pursue more concrete business opportunities. The result in both cases is a breakdown in the effectiveness of the bid protest system as a viable oversight mechanism. Conversely, a fast-moving protest process, so long as it provides meaningful and enforceable results, can build great confidence in the viability of the review mechanism and bolster the entire public procurement enterprise.

Second, because it harnesses the incumbent talent and experience of procuring agency personnel to conduct protest reviews, the agency-level option has the potential to be immediately effective – particularly in nations where the number of non-agency personnel with expertise in the public procurement field is limited. Although a national bid protest system could just as well immediately steer bid protest cases to existing courts and boards, the sitting judges and board members would likely be unfamiliar with

¹⁸⁸The unintended side effect of this practice is that it discourages potential suppliers from competing for government contracts by causing them to distrust the procuring agencies.

fundamental public procurement concepts.¹⁸⁹ As such, they would be ill-prepared to give protests meaningful consideration. The struggles encountered with the emergent Canadian bid protest system lend tangential support to this point. There the members of the national bid protest tribunal,¹⁹⁰ while all well-educated and capable, have very limited experience in public procurement matters. In contrast, persons internal to the procuring agencies, with their expertise and access to the procurement records, can provide supremely meaningful reviews. This benefit may carry particular value in nations where the legal system and its incumbent jurists are not regarded with great esteem.

Third, the agency-level system's non-adversarialism, which is the basis for many of its efficiencies, also carries the capability of circumventing potential supplier concerns about "taking on" their own governments in a litigation atmosphere. In nations where the concept of enforcing one's rights against the government is not ingrained as a societal value, the informal procedures of the agency-level protest system may offer the best (and possibly only) means of drawing disappointed offerors into their important oversight role.

Still, despite the great potential of the U.S. model, local suppliers (and outside observers) may have well-founded reservations about the wisdom of allowing procuring agencies essentially to police themselves. No matter how well an agency constructs its review system and how sincerely it proclaims its impartiality and fairness, if it resides in an environment characterized by corrupt practices, a lack of accountability, and weakness

¹⁸⁹ Another option is to create specialized courts or boards to handle bid protests. The problem, however, remains: there will probably not be enough "extra" people experienced in public procurement to staff these fora.

in the rule of law, it is bound to struggle to produce fair results – both in practice and perception. Thus, developing nations would be well advised, in adopting the U.S. model, to bolster its independence and transparency in the manner of the reforms discussed in Part VII.A above.

In fact, when it comes to addressing concerns about independence, developing nations could go one step further than the proposed U.S. Congressional reforms and vest protest decision-making authority in the hands of a dedicated core of “incorruptible” procurement experts dispersed within the various procuring agencies. If a nation did not have enough experienced public procurement personnel to fill these roles, it could initially look to international organizations, universities, or other nations to lend assistance while it worked to select and train native personnel. Regardless of the chosen approach, however, insulating the reviewers from outside influences while keeping them within the procuring agencies and close enough to the procurement process to benefit from the fundamental efficiencies of the agency-level system would be a prerequisite to long-term success.¹⁹¹ A developing nation could then cement this outward assurance of independence with the transparency-producing elements of a limited discovery

¹⁹⁰See *supra* note 45. Information regarding the CITT’s members can be found at its website at: http://www.citt-tcce.gc.ca/about/members_e.asp.

¹⁹¹Establishing such an arrangement could be extraordinarily difficult in some nations. Among other things, the reviewers would need to be compensated well enough to shield them from most temptations associated with corruption. So, too, they would need to be protected from discriminatory and retaliatory employment practices both from within their agencies and from other government officials. In the U.S. system and elsewhere, civil service systems which guarantee government employees due process rights to challenge employment actions taken against them serve this function. Regarding the U.S. bid protest systems specifically, some of the most successful agency-level programs vest protest decision-making authority in the hands of

mechanism and a requirement for publishing decisions. Both practices would serve to encourage impartial reviews and the enforcement of appropriate remedies. Finally, if these measures do not satisfy the concerns of a sufficient percentage of contractors, developing nations could implement another element of the U.S. system: make the agency-level system an alternative choice that disappointed offerors could avoid if they doubted its equity.

C. Conformity with the International Public Procurement Agreements

The final test of the U.S. agency-level option's viability as a model for developing nations arguably comes in evaluating its "fit" with the bid protest requirements of the international public procurement agreements. As discussed, although developing nations will not often be immediately eligible for membership in these agreements, membership may well be a long-term goal. Thus, the extent to which the agency-level model can move developing nations toward conformity with the pertinent agreements may be a factor in determining its ultimate acceptability. That said, developing nations might be better served by focusing their procurement development efforts on building effective systems (including bid protest systems), whatever their form, rather than on tailoring their efforts to meet the demands of the GPA and other international agreements.

As noted, the international agreements, as a general rule, give their stamp of approval to bid protest systems that are judicial in nature – meaning that they formally guarantee disappointed offerors broad due process protections. The GPA and EU

procurement attorneys who are both outside of the contracting officer's chain of command and outside of agency acquisition channels. *See* Troff, *supra* note 157, at 36.

Directives are quite explicit on the matter, specifically requiring that member states send bid protest cases to either courts or court-like tribunals. The EU Directives do leave some room for less formal agency-level systems; however, they require that the decisions of review bodies that are not judicial in character must be subject to appeal to tribunals that enforce court-like due process rules.¹⁹² NAFTA is considerably less formalistic in its approach, requiring only that the reviewing authority have “no substantial interest in the outcome of procurements.”¹⁹³ Thus, under NAFTA, a member state could potentially use a non-judicial protest review tribunal. However, the state would probably be hard-pressed to show that an agency reviewing its own procurement actions had “no substantial interest” in them.

Although each of the agreements considered in this paper permits its member states to encourage disappointed offerors to initially bring their protests to the procuring agencies, none of them considers the agency-level bid protest forum to be a satisfactory alternative to independent, external protest fora. Accordingly, a developing nation interested in membership in these agreements will need to provide disappointed offerors with an alternative to the agency-level option. However, if a developing nation can build a successful agency-level program, it will have all of the components in place – trained/experienced protest reviewers, a foundation of respect for government impartiality, a willingness by procuring agencies to implement meaningful remedies, and an understanding of the value of efficiency – to more readily establish an alternative bid

¹⁹²See *supra* notes 123-124 and accompanying text.

¹⁹³See *supra* note 106.

protest tribunal (whether it be administrative or judicial) that will satisfy the requirements of the international agreements. Accordingly, developing nations should not disdain the U.S. agency-level model because of its apparent incompatibility with the international public procurement agreements. Rather, they should embrace it for its flexibility and capacity to provide objective, inexpensive, and efficient solutions and to bolster mutually beneficial market relationships.